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89-381
No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

STATE OF MAINE,
Petitioner

V.

PAUL WING, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

JAMES E. TIERNEY
Attorney General

JAMES T. KILBRETH
Chief Deputy Attorney General
State House Station 6
Augusta, Maine 04333
(207) 289-3661
Counsel of Record for Petitioner

DAVID W. CROOK
District Attorney

WAYNE S. MOSS
Assistant Attorney General

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the police violated the curtilage around Mr. Wing's house in driving up and making observations from his driveway that were used to establish probable cause for a search warrant.

2. Whether the police violated the curtilage around Mr. Wing's house when they walked from the end of Wing's driveway away from his house across a lawn area, which was (1) separated from Wing's house and immediately adjacent grounds by a rock wall

and trees; (2) at least 100 to 295 feet away from his house; (3) on a slightly higher elevation than and not visible from his house; and (4) visible from the end of Wing's driveway, from Wing's woods, from his neighbor's property, and from the air.

LIST OF PARTIES

The parties to the proceeding in the Maine Supreme Judicial Court were the petitioner State of Maine and the respondents Paul Wing and Patricia Magagnoli. Blaine Richards was a separate appellee in the Maine Supreme Judicial Court concerning the searches of his property. Since the Maine Supreme Court upheld the searches of Richards' property, those searches are not addressed in this petition, and Blaine Richards is not named as a party herein.

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The opinion of the Supreme Judicial Court of Maine in State of Maine v. Paul Wing, Decision No. 5099, Law Docket No. Ken-88-225 (Decided June 2, 1989), which affirmed by an evenly divided court the Maine Superior Court's suppression order, is published at 559 A.2d 783 (Me. 1989) and is reproduced in Appendix A (pages 1-16) of this petition. The Maine Superior Court order finding that the police violated the curtilage of Wing's home is reproduced in Appendix B (pages 17-56) of this petition.

JURISDICTION

The judgment of the Supreme Judicial Court of Maine in State of Maine v. Paul

Wing was entered on June 2, 1989, and the Court's mandate issued the same day. The sixty-day period provided in U.S. Sup. Ct. Rule 20.1 for filing a certiorari petition would have ended on August 1, 1989. Pursuant to Rule 20.1, Mr. Justice White, by order dated July 20, 1989, extended the State's time for filing its certiorari petition by thirty days to and including August 31, 1989.

Petitioner State of Maine invokes the jurisdiction of the Supreme Court of the United States pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS

The fourth amendment to the Constitution of the United States:

> The right of the people to be secure in their

> persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

During a summer afternoon flyover of Litchfield, Maine, officers of the Kennebec County Sheriff's Department observed green leafy substances, which they believed to be marijuana plants, growing in a vegetable garden at the edge of a clearing and away from the main house in the clearing. From the airplane, the officers also observed that the only entrance to the clearing was by a driveway leading to a public road, the

Oak Hill Road. After landing their plane on a nearby lake approximately fifteen minutes later, the officers drove directly to and entered this driveway. The officers did not have to traverse any fences to enter, and the property was not posted with any "no trespassing" signs. (App. 20-21).

Approximately one hundred feet in from the road, the driveway divides into a "Y" with the left branch leading to a house later determined to be owned by Paul Wing and the right branch leading to Wing's garage, gazebo, vegetable gardens, shed, picnic furniture and equipment, and lawn area. (App. 56). The garage is approximately one hundred feet from the house, and a low rock wall and trees separate the area around the house from the garage, gazebo, vegetable gardens, shed,

and lawn area, which are on a slightly higher elevation than and not visible from the house. (App. 24).

The officers took the right branch of the driveway towards the garage to bring them closer to the marijuana patch seen from the air (identified as 4B in the diagram at App. 56). In the course of driving to the end of the right branch, the officers saw straight ahead of them additional marijuana growing in a vegetable garden (identified as 3B in the diagram at App. 56) near the gazebo (labelled "screen house" in diagram). This additional marijuana had not been seen from the air.

The officers parked their car at the end of the driveway on the grassy area between 4B and the gazebo and walked over to 4B to confirm that marijuana was there.

4B is 195 feet from the garage, more than 200 feet from the stone wall separating the Wing house and its grounds from the lawn crossed by the officers, and roughly 295 feet from the Wing house itself. (App. 24, 56). It was later determined that 4B is located on the property of Blaine Richards approximately thirty feet beyond the Wing-Richards' property line. (App. 22). On the basis of their observations from the air, the Wing driveway, and their walk to 4B, all of which were included in an affidavit, the officers obtained a search warrant that was executed later that day.

A Kennebec County Grand Jury subsequently indicted Paul Wing and Patricia Magagnoli, who was living at Wing's house, of unlawful trafficking in scheduled drugs (17-A M.R.S.A. § 1103) and

unlawfully furnishing scheduled drugs (17-A M.R.S.A. § 1106). Both Wing and Magagnoli filed in Maine Superior Court (Kennebec County) motions to suppress all evidence obtained as a result of the flyover, the warrantless entry onto the Wing property, and the search warrant itself.

After hearing, the Maine Superior Court granted both motions to suppress. The court ruled that "[t]he entry onto the property of Paul Wing constituted an [illegal] entry into the curtilage, as that concept is elaborated in United States v. Dunn, 107 S.Ct. 1134 (1987)." (App. 39). Emphasizing that Wing's house, garage, gazebo, shed, gardens, and lawn area are not visible from the public road and were deliberately sited to assure privacy, the

superior court was impressed by Wing's steps to protect his "structures and garden plots from public view." (App. 41-42). The court further observed that Wing engaged in sexual and social activities in these areas, which the court thought made the areas into an extension of the home itself and thus curtilage. (App. 42-44). The court then struck down the search warrant on the ground that without the information from the illegal entry into the curtilage the affidavit did not establish probable cause for the warrant's issuance.

Petitioner appealed to the Maine Supreme Judicial Court and again argued that Wing's driveway and the area traversed by the police on their walk out to 4B are not curtilage. Without any analysis of the fourth amendment issues involved, the Maine

Supreme Court affirmed by an evenly divided court the lower court's suppression order.

REASONS FOR GRANTING THE WRIT

I. THE PETITION SHOULD BE GRANTED WITH RESPECT TO QUESTION 1 BECAUSE THE MAINE COURTS HAVE DECIDED AN IMPORTANT QUESTION OF FOURTH AMENDMENT LAW - WHETHER DRIVEWAYS ARE OUTSIDE THE CURTILAGE - IN A WAY THAT CONFLICTS WITH DECISIONS OF FEDERAL COURTS OF APPEALS, OTHER STATE COURTS OF LAST RESORT, AND THIS COURT'S DECISION IN UNITED STATES V. DUNN.

This case presents a scenario that happens on numerous occasions each day across the country. Law enforcement officers drive and walk up driveways to investigate crime every day. It is therefore essential that police have clear

guidance as to whether or under what circumstances a driveway is entitled to fourth amendment protection. Cf. Oliver v. United States, 466 U.S. 170, 181 (1984) ("case-by-case approach" to the applicability of the fourth amendment to open fields does not "provide a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment"). The police should not have to guess before every search as to whether a driveway is sufficiently concealed from public view, sufficiently long, posted with a sufficient number of warning signs, sufficiently blocked by a gate, or sufficiently close or leading to a house as to fall within the curtilage. Cf. Oliver, 466 U.S. at 181 (police should not have to guess before searching open fields

"whether landowners had erected fences sufficiently high, posted a sufficient number of warning signs, or located contraband in an area sufficiently secluded to establish a right of privacy"). The need for clarity is probably even greater for driveways than for open fields since driveways (or walkways) are usually the only means of access to a home and are used by the police with probably much greater frequency than are open fields.

The unsettled nature of this issue is illustrated not only by the 3-3 split within the Maine Supreme Court but also by the conflict between the Maine Court's ruling and the decisions of federal courts of appeals and other state courts of last resort that have found driveways to be outside the curtilage. See, e.g., United

States v. Roberts, 747 F.2d 537 (1984) (curtilage not violated where police drove one mile up shared, unobstructed, private road posted with "Private Road Keep Out" signs and then onto lawn of residence within 10 feet of house, which was a parking area); United States v. Ventling, 678 F.2d 63 (8th Cir. 1982) (curtilage not violated where agent drove up rural driveway on property posted with "no trespassing" signs and crossed portion of the yard immediately adjacent to front door); United States v. Humphries, 636 F.2d 1172 (9th Cir. 1980), cert. denied, 451 U.S. 988 (1981) (curtilage not violated where agent trespassed onto a private driveway to determine the license plate number of a car parked in the driveway); People v. McGahey, 179 Colo. 401, 500 P.2d

977 (1972) (curtilage not violated where officer drove up driveway to within 25 feet of house located 100 to 150 yards off street, and then saw marijuana plants in picture window of house); State v. Brighter, 60 Hawaii 318, 589 P.2d 527 (1979) (curtilage not violated where police drove up driveway through openings in two fences to a van near the house located approximately 200 yards from the public road); State v. Wilbourn, 364 So.2d 995 (La. 1978), cert. denied, 444 U.S. 825 (1979) (curtilage not violated where police entered unenclosed carport to look at front of vehicle); Commonwealth v. Simmons, 392 Mass. 45, 466 N.E.2d 85 (1984) (curtilage not violated where officer and victim proceeded up unobstructed driveway which was normal means of access to house to look

at vehicle located between 1 and 2 feet from the driveway); State v. Crea, 305 Minn. 342, 233 N.W.2d 736 (1975) ("The police had a right to walk onto the driveway because it was an area of the curtilage impliedly open to use by the public."); State v. Pike, 143 Vt. 283, 465 A.2d 1348 (1983) ("when state officials come onto private property to conduct an investigation and restrict their movements to driveways which visitors could be expected to use, observations made from such vantage points are not covered by the Fourth Amendment"). Contra Teeman v. State, 664 P.2d 1071 (Okl. Cr. 1983) (curtilage violated where police made observations from private dirt road leading to defendant's house and approximately one-half block from house).

The Maine Court's ruling also conflicts with - and gives this Court an opportunity to analyze driveways under - United States v. Dunn, 480 U.S. 294 (1987), where the Court stated that "the nature of the uses to which the area is put" can be "especially significant" in determining extent-of-curtilage questions. Dunn, 480 U.S. at 301, 302. The very nature of a driveway is to provide access to a person's residence or the interior of his property. Driveways simply do not "provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from government interference or surveillance." Oliver, 466 U.S. at 179.

On several occasions this Court has quoted William Pitt's remarks to the House of Commons in 1763 as an embodiment of fourth amendment principles:

> "'The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter--all his force dares not cross the threshold of the ruined tenement!'"

Payton v. New York, 445 U.S. 573, 601 n.54 (1980) (quoting Miller v. United States, 357 U.S. 301, 307 (1958)); United States v. Ross, 456 U.S. 798, 822 n.31 (1982). The implication of Pitt's remarks is that while the home itself is sacred, the approach to it is not. This petition should be granted with respect to Question 1 to provide this Court with an opportunity to state whether or under what circumstances a driveway is protected by the fourth amendment.

II. THE PETITION SHOULD BE GRANTED WITH RESPECT TO QUESTION 2 - WHETHER THE LAWN AREA IS OUTSIDE THE CURTILAGE - BECAUSE THE MAINE COURTS APPLIED THE DUNN TEST INCORRECTLY AND BECAUSE THE FACTS OF THIS CASE PRESENT AN OPPORTUNITY FOR FURTHER CLARIFICATION OF WHAT CONSTITUTES CURTILAGE.

The petition should be granted with respect to Question 2 because this case, given the sexual and social use of the lawn area traversed by the police on their walk out to 4B, presents a different and more difficult set of facts for determining curtilage than those in Dunn. Since the Maine Courts applied the Dunn test incorrectly, this case provides an opportunity for this Court to give clearer guidance to individuals, courts, and police on extent-of-curtilage questions.

In Dunn, the Supreme Court stated that one of the factors to be considered in resolving curtilage questions is "the steps taken by the resident to protect the area from observation by people passing by." Dunn, 480 U.S. at 301. This factor weighed against Dunn because this Court observed that Dunn "did little to protect the barn area from observation by those standing in the open fields." Dunn, 480 U.S. at 303. In reaching this conclusion, this Court found immaterial that the barn area was located about one-half mile from a public road on a 198 acre ranch completely encircled by a perimeter fence and that the barn itself was surrounded by "various interior fences" and "[l]ocked, waste-high gates barred entry into the barn proper, and netted material stretched from the

ceiling to the top of the wooden gates." Dunn, 480 U.S. at 297, 303.

Here, the Maine Superior Court emphasized that Wing took substantial steps to protect the lawn area traversed by the police from public view by maintaining "[a] substantial border of trees along the public road." (App. 41-42). In view of Dunn, however, the superior court incorrectly applied this factor by failing to take into account the lawn area's visibility from Wing's woods which are no different than open fields (Oliver, 466 U.S. at 180 n.11), as well as from Richards' property in the area around 4B, from the air (Oliver, 466 U.S. at 179), and from the end of Wing's driveway.

Two other Dunn factors are particularly important in requiring the lawn area to be

considered outside the curtilage: first, the area's 100 to 295 foot distance from the Wing house (180 feet from house in Dunn "supports no inference that the barn should be treated as an adjunct of the house" (Dunn, 480 U.S. at 302)); and second, the separation of the lawn area from Wing's house by a rock wall, trees, and elevation so that the lawn area is not even visible from the house. In view of these two factors alone, even if Wing should be considered to have taken substantial steps to protect the lawn area from observation by people passing by, the area is still not curtilage. Moreover, pursuant to Oliver, 466 U.S. at 182, Wing could not create a fourth amendment reasonable expectation of privacy in his lawn area - even though used for "lovers' trysts" (see Oliver, 466 U.S.

at 179 n.10) and social activities - simply by concealing it from public view.

This petition should be granted with respect to Question 2 so this Court can give further guidance on how Dunn should be applied and what constitutes curtilage.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Maine Supreme Judicial Court in State of Maine v. Paul Wing, 559 A.2d 783 (Me. 1989).

Respectfully submitted,

JAMES E. TIERNEY
Attorney General
State of Maine

JAMES T. KILBRETH
Chief Deputy Attorney General
State House Station 6
Augusta, Maine 04333
(207) 289-3661
Counsel of Record for Petitioner

DAVID W. CROOK
District Attorney

WAYNE S. MOSS
Assistant Attorney General

Dated: August 30, 1989

APPENDIX A

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions
Decision No. 5099
Law Docket Nos.
Ken-88-225
Ken-88-406

STATE OF MAINE

v.

PAUL WING and PATRICIA MAGAGNOLI

STATE OF MAINE

v.

BLAINE A. RICHARD

Argued January 18, 1989
Decided June 2, 1989

Before McKUSICK, C.J. and ROBERTS, GLASSMAN, CLIFFORD, HORNBY, and COLLINS, JJ.

GLASSMAN, J.

The Kennebec County Grand Jury returned indictments against Paul Wing, Susan Magagnoli, Blaine Richard, and Karen

Randall. Paul Wing and Susan Magagnoli were indicted on identical two-count indictments charging them with unlawful trafficking in marijuana in violation of 17-A M.R.S.A. § 1103 (1983 & Supp. 1988) and unlawful furnishing of marijuana in violation of 17-A M.R.S.A. § 1106 (1983 & Supp. 1988). Blaine Richard was indicted on six counts including: unlawful trafficking in cocaine in violation of 17-A M.R.S.A. § 1103; unlawful possession of cocaine in violation of 17-A M.R.S.A. § 1107 (1983); unlawful trafficking in marijuana in violation of 17-A M.R.S.A. § 1103; unlawful furnishing of marijuana in violation of 17-A M.R.S.A. § 1106; unlawful trafficking in hashish in violation of 17-A M.R.S.A. § 1103; and unlawful possession of hashish in violation of

17-A M.R.S.A. § 1107. Karen Randall is not a party to this appeal.

All three defendants pleaded not guilty to the charges and filed motions to suppress all evidence obtained from a search of the residential premises of Wing and Richard.[1] The Superior Court (Kennebec County, Lipez, J.) granted the motions to suppress filed by defendants Wing and Magagnoli[2] and denied the motion filed by Richard. In this consolidated appeal the State appeals from the decision

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[1]Prior to this appeal, Richard entered a conditional plea of guilty to his indictment pursuant to M.R. Crim. P. 11(a)(2).

[2]The standing of Magagnoli to make a fourth amendment violation claim has not been challenged by the State. Accordingly, we express no opinion on this matter.

granting Wing and Magagnoli's motions to suppress, and Richard appeals his conviction challenging the denial of his motion to suppress. We affirm the orders as to Wing and Magagnoli by an evenly divided court and affirm the judgment as to Richard.

I.

The record discloses the following: In response to an informant's tip about the possible cultivation of marijuana plants behind the residence of Blaine Richard, Kennebec County Deputy Sheriffs Paul A. Ferland and Gregory Lumbert rented an aircraft for the aerial surveillance of the area. During the flyover, the officers observed a green, leafy substance that they believed to be marijuana plants growing in a cultivated area which they believed to be on the property of Richard. The officers

did not observe anyone in the area. After landing the plane on a nearby lake, the officers met Chief Daniel McGinley of the Monmouth Police Department for the purpose of driving to the area viewed from the plane. They passed the driveway to the Richard property and entered the driveway of property later determined to be owned by Wing.

The Wing property consists primarily of wooded land enclosing a clearing that contains a house, garage and landscaped lawn area which are not visible from the road. Wing's curved driveway, several hundred feet long, divides into a "Y" at a point approximately 100 feet from the road with the left branch leading to the Wing residence and the right branch leading to the garage and landscaped lawn area. The garage is approximately 100 feet from the

house and the lawn area is near the garage on the side further from the house. The lawn area contains a gazebo, barbecue pit, shed, garden, picnic tables and lawn chairs. Neither the garage nor the lawn area is visible from the house. Due to an upgrade in the right branch of the driveway the lawn area is not visible until after the "Y" intersection. The officers drove up the right branch, parked the car at the end of the driveway in a grassy area, and saw marijuana plants interspersed in a vegetable garden located in Wing's lawn area. This garden had not been observed from the air.

Approximately 30 feet from the Wing-Richard property line, Officers McGinley and Ferland located the garden with marijuana plants Ferland had seen during the aerial surveillance. It was

later determined that this garden was on Richard's property. A well beaten path led from this garden through a wooded area to the Richard house. From a knoll approximately 50 feet behind this garden Deputy Ferland observed two gardens with marijuana plants in close proximity to Richard's residence. Neither of the gardens was enclosed in any way.

Additional officers from the Kennebec County Sheriff's Department arrived and were directed to secure both the Wing and Richard residences while Deputies Ferland and Lumbert secured a search warrant for the properties. Wing returned to his residence with Magagnoli, and Richard arrived with Karen Randall at the Richard residence while the deputies were securing the warrant. On the return of the deputies with a warrant, both the Wing and Richard

residences and other buildings and vehicles present at the premises were searched, evidence was seized, and the marijuana plants were harvested.

The trial court found that the officers entered into the curtilage of Wing's home prior to the issuance of the warrant and suppressed all of the evidence obtained from the search of the Wing property. The court further determined that without the information derived from that illegal entry into the Wing curtilage the affidavit was insufficient to support the issuance of a warrant for a search of the Wing premises. The State challenges both of the trial court's findings. Because the court is evenly divided as to whether the trial court properly suppressed the evidence, we affirm.

II.

On his appeal Richard contends that because prior to the issuance of the search warrant the officers entered into the curtilage of his home, the description contained in the search warrant for the property seized was not sufficiently specific, and the warrant affidavit contained reckless or intentional material misstatements, the trial court erred in denying his motion to suppress the evidence seized from his premises. We disagree.

Richard first contends that in applying the factors set forth in United States v. Dunn, 480 U.S. 294 (1987),[3] the Superior

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[3]In the Dunn case the Court set forth four factors as "useful analytical tools": the proximity of the area claimed to be curtilage to the home, whether area included in enclosure surrounding home, nature of uses of area, and the steps taken to protect area from observation of passers by.

Court could not find that the officers entered into the Wing curtilage without also finding that the officers entered into the Richard curtilage. This argument is without merit. We have previously stated that the reach of the curtilage of a home depends on the facts in each case. State v. Pease, 520 A.2d 698, 699 (Me. 1987); see also State v. Silva, 509 A.2d 659, 661 (Me. 1986). The marijuana patch observed in the flyover by the deputies was some distance away and separated from the Richard residence by a wooded area through which a path led toward the residence. At a point nearby the deputies observed another marijuana patch located approximately 139 feet to the northeast of the Richard

residence. A third patch was located approximately 60 feet northwest of the Richard residence and separated from the residence by a gully and wooded area. There was evidence that there was no cultivation of a grassy area or any other indicia of domestic uses in or around either of the three marijuana patches. Based on this evidence the trial court was warranted in determining that the three marijuana patches were not observed by the police from within an area protected by the fourth amendment. See United States v. Dunn, 480 U.S. 294 (1987); State v. Pease, 520 A.2d at 699.

Richard next contends that the search warrant was defective because it provided only a generic description of the property to be seized. We have stated:

> A search warrant must describe the items to be

> seized with a particularity that will enable the searching police officer to identify them with certainty. Such particularity discourages general searches and prevents the unauthorized seizure of property under the mistaken belief that it falls within the authorization of the warrant.

State v. Sweatt, 427 A.2d 940, 949 (Me. 1981).

The search warrant identified the articles sought as: "Marijuana, drugs, drug paraphernalia, drug records, and any evidence associated with drug trafficking as is more fully described in the attached affidavit of Paul A. Ferland...." Ferland's affidavit further listed items, all alleged to be related to the sale, acquisition or distribution of controlled drugs and contraband. The trial court properly determined that because the goods

described in the warrant and affidavit are contraband, or directly related to the sale, distribution or acquisition of contraband, the generic description was appropriate. See State v. Sweatt, 427 A.2d at 949 ("Generic descriptions are permissible only when the affidavits establish that any of the generically described goods found at the searched premises 'were likely to have been stolen and constituted a dominant part of the goods on the premises.'" (quoting United States v. Abrams, 615 F.2d 541, 545 (1st Cir. 1980))).

Richard further argues that because the car was not sufficiently described in the search warrant, the seizure of Richard's cocaine from Karen Randall's car was

illegal.[4] The evidence disclosed that police officers had observed the car driven by Richard with the owner, Karen Randall, as a passenger, arrive on the Richard premises prior to the issuance of the warrant. Under the circumstances, the description "motor vehicles on the premises" in the warrant is sufficiently particular to pass constitutional scrutiny and permit the search of Karen Randall's car. See United States v. Asselin, 775 F.2d 445, 446-47 (1st Cir. 1985) (warrant authorizing search of premises with trailer and attached carport sufficient to cover search of car parked adjacent to carport) (citing United States v. Napoli, 530 F.2d 1198, 1200-1201 (5th Cir. 1979) (camper

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[4]We assume, without deciding, that Richard had standing to raise this issue.

vehicle parked in driveway included in "premises")).

Nor do we find any merit in Richard's final contention of alleged misstatements in the warrant affidavit. Under Franks v. Delaware, 438 U.S. 154, 171-72 (1978), if a warrant affidavit contains false statements that were made recklessly or intentionally, the statements must be excised from the affidavit prior to an evaluation of whether the remaining information supports a finding of probable cause. There is competent evidence in the record to support the trial court's findings that the misstatements contained in the affidavit were at most negligent misstatements and were nonetheless immaterial to the probable cause determination of the complaint justice. See State v. White, 391 A.2d 291 (Me. 1978).

The entry is:

Orders of the Superior Court granting Paul Wing's and Patricia Magagnoli's motions to suppress affirmed by an evenly divided court. Judgment of conviction of Blaine A. Richard affirmed.

All concurring.

Attorneys for the State:
James E. Tierney,Esq.
Attorney General
Wayne S. Moss, Esq.
(orally)
Assistant Attorney General
State House
Station 6
Augusta, Maine 04333

Attorneys for Defendants:
John D. Pelletier,Esq.
(orally)
GOODSPEED & O'DONNELL
10 Summer Street
P. O. Box 785
Augusta, Maine 04330
Walter T. Ollen,Jr.,Esq.
FARRIS & SUSI
251 Water Street
P. O. Box 120
Gardiner, Maine 04345
P.J. Perrino,Jr., Esq.
(orally)
124 State Street
Augusta, Maine 04330
(for Blaine A. Richard)

APPENDIX B

STATE OF MAINE

KENNEBEC, ss.

SUPERIOR COURT
Criminal Action
Docket Nos.
CR-87-427
CR-87-428
CR-87-429
CR-87-430

STATE OF MAINE,
Plaintiff
v.
PAUL WING
BLAINE RICHARDS
PATRICIA MAGAGNOLI
and KAREN RANDALL
Defendants

DECISION AND ORDER

The matters before the court are the motions to suppress of the four defendants. These motions were the subject of a lengthy evidentiary hearing. Although these cases have not been consolidated for trial, the parties agreed that the motions to suppress should be heard at the same time. Given the issues raised by defendants, the facts must be set forth in some detail.

FINDINGS OF FACT

1. On August 19, 1987 Deputy Paul A. Ferland and Deputy Gregory Lumbert of the Kennebec County Sheriff's Office participated in a fly-over of an area in Litchfield. During that fly-over they observed a green, leafy substance that they believed to be marijuana plants growing in a cultivated garden. They thought the garden might be on the property of Blaine Richards.

2. At no point did the plane in which the deputies were flying go below 500 feet above sea level. They circled the area that interested them about ten or fifteen times. They were excited by what they saw.

3. At a distance of approximately 20 to 30 feet from the cultivated garden, the deputies saw a stationery red pickup truck with the tailgate down. The presence of

the truck prompted a concern on the part of the officers that evidence at the scene would be destroyed.

4. The deputies did not see any people on the ground in the area they were viewing.

5. Although the officers did not see anyone on the ground, they recognized that individuals could easily be concealed in the heavily wooded area that surrounded the open field or lawn area surrounding the houses on the ground below them. The officers also knew that it would be easy for somebody on the ground to detect the airplane flying low overhead and circling the site.

6. The deputies called the Kennebec Sheriff's Department to send a car while still in the airplane. However, upon being told that it would take about one-half hour to get a car to the scene, the deputies

called the Monmouth Police Department. They were told that a car could arrive at the shore of Tacoma Lake in minutes to pick them up and take them to the area where the suspicious plants were viewed.

7. When the deputies saw a police vehicle approaching the lake, the officers directed that the plane land on the lake. The deputies met Chief Daniel McGinley of the Monmouth Police Department at the lake side and drove to the area viewed from the plane. Approximately fifteen minutes elapsed from the time the officers first observed what they thought were marijuana plants until their landing on the lake to meet Chief McGinley.

8. The officers drove to and entered a driveway that took them into the property of Paul Wing. There were no "No Trespassing" signs at the border of the

property. They did not have to traverse any fences to enter. At that time the officers did not know who owned the property they were entering. Deputy Ferland had received an informant's tip in January 1987 about the possible cultivation of marijuana on property owned by Blaine Richards in the area under airplane surveillance. The officers later determined that the Richards' property was adjacent to the property owned by Paul Wing. Deputy Ferland did not act on the tip until August 1987 because he wanted to get information on several areas before going to the expense of hiring an airplane.

9. The driveway into the Wing property divides into a Y at a point about 100 feet from the road. The driveway to the left leads to the Wing residence. The driveway to the right leads to a lawn area. The

officers could not see into that lawn area because of a rise in the driveway until they got beyond the Y intersection.

10. The officers took the driveway to the right and parked the car on the grassy area between 4B and the screen house or gazebo (See State's Exhibit #1 attached hereto as an appendix). The driveway ended at the grassy area. The officers saw before them what appeared to be marijuana plants growing in a plot identified as 3B on State's Exhibit #1. That garden was not the garden that was observed from the air. That garden is identified as 4B on State's Exhibit #1. It was later determined that 4B is located on the property of Blaine Richards some 30 feet from the Wing-Richards' property line.

11. Paul Wing bought his property in 1978. It consists of 4.5 to 5 acres. He

was responsible for putting in the road leading into the property and for constructing the buildings on the property.

12. Wing purposely put a bend in his driveway and selectively cleared trees to obstruct the view of his property from the public highway and assure his privacy.

13. The landscaping on the Wing property is around the house and the gazebo.

14. The yard area, particularly the area around the gazebo, is used by Paul Wing for recreational and social activities. Picnics have been held in the gazebo and outside it. He and Patricia Magagnoli, his companion, would sunbathe nude in the area around the gazebo. He and Patricia Magagnoli also engaged in sexual intercourse in the lawn area near the gazebo.

15. There was a distance of about 100 feet between the Wing residence and the garage. The shed and the gazebo were near the garage, and much closer to the garage than they were to the residence itself.

16. The gazebo and garage cannot be seen from Paul Wing's house. The area between the house and the gazebo and garage is divided to some extent by a low rock wall. There are also trees that separate the areas.

17. To get from the residence of Paul Wing to the garage, it is necessary to walk up some steps and through a break in the rock wall.

18. Deputy Ferland and Chief McGinley walked to the area of 4B, the garden that was seen from the air. In doing so, they passed by the gazebo and a picnic table. There were also lawn chairs around the

gazebo. They confirmed that marijuana plants were growing in that garden.

19. While standing near 4B, Deputy Ferland saw two people whom he could not identify run from what he later learned was the Richards' residence to a car. Although Deputy Ferland did not actually see the car leave, he heard the car doors slam and then heard the sound of a departing vehicle.

20. Chief McGinley observed a well-beaten path in the woods between the Wing and Richards properties.

21. Chief McGinley walked to a knoll that was approximately 50 to 60 feet behind 4B. By standing on this knoll he could look down behind the Richards' residence. From this point he could see the areas identified as 1A and 2A on the Richards property. Neither of these gardens were enclosed in any way. From the knoll Chief

McGinley could see marijuana plants growing in 2A. Upon closer observation he observed marijuana plants in both 2A and 1A. Garden 1A is 139 feet from the Richards' residence. Garden 2A is 60 feet from the residence. There was no manicured grass around the Richards' residence.

22. The area around the Wing and Richards residences was heavily wooded. There was only one driveway into each property. Those two driveways were about 60 feet apart, measured along Oak Hill Road. The Wing residence was not visible from the road.

23. The officers at the scene had called for additional officers to help them. These officers arrived and were asked by Deputy Ferland to secure the sites (the Wing and Richards properties) while Deputy Ferland and Deputy Lumbert returned

to Augusta to obtain search warrants for the Richards and Wing properties. Deputy Ferland and Deputy Lumbert left the scene at 4:49 p.m. to get the search warrants, traveling to Augusta in Chief McGinley's car. Chief McGinley returned to the Wing property.

24. Before obtaining the warrants Deputy Ferland received information identifying the properties they had visited as the properties of Paul Wing and Blaine Richards. This information was obtained from tax maps.

25. In the affidavit used to secure the warrants, Deputy Ferland refers to a truck that appears to be harvesting marijuana. This is a reference to the red pickup observed near 4B. Deputy Ferland drew his conclusion about possible harvesting from the proximity of the truck

to the field. He also noted that the tailgate was down. He could not actually see into the truck to see what it might contain. Marijuana plants are usually harvested in September or October.

26. The basis for asserting in his affidavit that he had reason to believe that the officers were detected by people on the ground was the belief that a low-flying airplane could easily be detected by someone on the ground.

27. Deputy Ferland received radio communications about the arrival of Blaine Richards and Karen Randall at the Richards property and the arrival of Paul Wing and Patricia Magagnoli at the Wing residence. The references in the affidavit to automobiles at the scene were on the basis of these radio communications.

28. Deputy Todd Brackett of the Kennebec County Sheriff's Office was primarily responsible for securing the Wing residence after Deputies Ferland and Lumbert left the scene to obtain the search warrant. Patricia Magagnoli arrived at the Wing residence at about 5:05 p.m. Deputy Brackett explained to her why he was there and asked her to remain at the scene. Paul Wing arrived at 6:30 p.m. Deputy Brackett had a similar conversation with him. He was told that the police were in the process of obtaining a search warrant for his property.

29. Paul Wing arrived at the scene in shorts. When it began to rain he asked if he could go into his house to change clothes. He was told that he could not. Wing then went into the gazebo where he was followed by Deputy Brackett. Wing told

Brackett that he did not want him in the gazebo. Brackett told Wing that he could not be in the gazebo unsupervised.

30. While Patricia Magagnoli was waiting at the scene she was not allowed to go to the bathroom in the house, and she was not allowed to enter the house to get more clothes. She was permitted to go into the gazebo.

31. Deputy Poulin of the Kennebec County Sheriff's Department was responsible for securing the Richards property. While he was at the scene a vehicle pulled in to the Richards driveway with three people in it. Blaine Richards was driving the vehicle. Karen Randall was in the passenger seat. A Mr. Libby was also a passenger in the car. This vehicle arrived at the Richards residence at about 5:20

p.m. Deputy Poulin asked the three individuals for their identification.

32. In response to a question from Blaine Richards about what was going on, Deputy Poulin simply told him that he was free to "hang around." Richards was free to leave the scene. However, Richards was subject to close supervision by Deputy Poulin at the scene. Richards was not allowed to go near his house.

33. When Karen Randall asked to go to her car which was on the property, Deputy Poulin accompanied her to the car. Randall could not leave the scene in her car. There was no evidence of contraband visible in the car.

34. Deputy Poulin was carrying a loaded shotgun in a visible position. That gun was never pointed at Randall or Richards.

35. When it began to rain Deputy Poulin told Richards and Randall to get inside his police cruiser to get out of the rain. Deputy Poulin spent some time in the cruiser with Randall and Richards and spent other times standing outside the vehicle.

36. Neither Richards nor Randall was given any Miranda warning at this juncture.

37. Deputies Ferland and Lumbert arrived back at the site at about 9:15 p.m. with search warrants for the Wing and Richards properties. They went first to the Blaine Richards residence. At that time Richards was in the back of Deputy Poulin's car along with Karen Randall and Mr. Libby. Deputy Ferland proceeded to speak with Richards outside of the cruiser. He gave Richards his Miranda warnings at 9:19 p.m. before talking to him. Richards waived his Miranda rights.

There were no handcuffs on him at the time. He was not under arrest. There was no shotgun visible in the hands of Deputy Poulin at the time. The first question asked of Richards was whether he lived at that residence. He replied that he did.

38. Deputy Ferland instructed Deputy Brackett to take charge of harvesting the marijuana on the Wing and Richards properties. That harvesting work was conducted from approximately 9:15 p.m. on August 17 until about 2:00 a.m. on August 18.

39. After the arrival of the warrant, Deputy Brackett went into the garage on the Wing property. In the upstairs of the garage he observed fluorescent lights and a heat lamp. He also observed dishes which could be used to start tomato plants.

40. District Attorney Crook, Sheriff Hackett and Major Raymond had followed the deputies to the scene. District Attorney Crook had gone directly into the Richards residence. Richards was asked to come into the house where District Attorney Crook and a number of officers were now present. District Attorney Crook gave Richards his Miranda warnings again and again Richards waived his Miranda rights. Richards was also shown the search warrant. Richards was told by District Attorney Crook that he was not under arrest. He was further told that the District Attorney did not care if he helped them with the search or not but it would facilitate matters if he was cooperative. Richards agreed to help. He led those present to a gun and then some scales.

41. Blaine Richards then left the house and returned to the cruiser that Deputy Ferland and Deputy Lumbert had arrived in. Richards got into the cruiser. Deputy Lumbert gave him Miranda warnings a third time and again the defendant agreed to talk. He informed Deputy Lumbert that he had grown a few marijuana plants. He said that the scales that were found in the house were used for some diets that he was following.

42. District Attorney Crook directed that the car of Karen Randall be searched. As a result of that search, Deputy Hanley reported to Deputy Lumbert that it appeared that cocaine had been found in the car. Upon hearing this information, Deputy Lumbert went into the Richards house to talk to Karen Randall, who was present in Blaine Richards' house while it was being

searched. She had been free to leave the house during the search. Deputy Lumbert first asked her if the car was hers. When she said it was, he gave her the Miranda warnings. She waived her Miranda rights. Upon being asked if there was anything in her car that should not be there, she said that she knew about it but she did not want to get Blaine into trouble. She then wrote and signed a statement in the presence of Deputy Lumbert. When Deputy Lumbert realized that he could not read her statement, she started to write it again. She then said that she did not want to say anything further. Deputy Lumbert stopped questioning her at that point.

43. District Attorney Crook went outside and confronted Richards with the bag containing what appeared to be cocaine. The District Attorney said to

Richards that he could save them the cost of analysis. Richards responded that the substance was cocaine and it had a street value of $3,000. When Major Raymond said how do we know whose cocaine it is, Richards replied that it was his cocaine, not hers (a reference to Karen Randall). At that point Richards said that he did not wish to talk anymore and he was arrested.

44. District Attorney Crook gave instructions on what the officers at the scene could do with respect to a search. He instructed them to search all vehicles on the premises.

45. Deputy Lumbert cannot recall reading the search warrant that had been obtained primarily through the efforts of Deputy Ferland. He also does not recall being involved in a meeting at which instructions were given on how to execute

the search warrant. He recalls being told to look for drugs and drug implements.

46. After District Attorney Crook arrived at the scene along with Sheriff Hackett and Major Raymond, Major Raymond was in charge of activities at the scene, including supervising the searches.

47. The officers involved in making decisions about how to proceed with the search of the Wing and Richards properties never discussed the possibility of posting men at the end of the driveway while efforts were underway to secure search warrants.

CONCLUSIONS OF LAW

1. The aerial surveillance conducted by Deputy Ferland and Deputy Lumbert did not constitute an unreasonable search of the premises of defendants Wing and Richards. The pilot David Smith indicated

that he did not fly below the federally established ceiling of 500 feet. He remained at all times within the navigable air space as defined by federal regulations. Pursuant to the principles set forth in California v. Ciraolo, 106 S.Ct. 1809 (1986), the officers obtained observations from public air space where they had a right to be.

2. The entry onto the property of Paul Wing constituted an entry into the curtilage, as that concept is elaborated in United States v. Dunn, 107 S.Ct. 1134 (1987). In footnote four at page 1139 of that decision, the United States Supreme Court rejected the government's invitation to adopt a "bright line rule" that "the curtilage should extend no farther than the nearest fence surrounding a fenced house." The court emphasized that such a rule would

serve no utility "in most cases where a house is situated on a large parcel of property that has no nearby enclosing fence...; a court would still be required to assess the various factors outlined above to define the extent of the curtilage." This observation is particularly relevant in this case where the home is located in a rural setting on a large parcel of property and the attempt to assure privacy involves reliance on natural enclosures such as trees.

The four factors cited by the Supreme Court must be applied to this rural setting. Those four factors are: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the

resident to protect the area from observation by people passing by. Id. at 1139.

As the State notes in its memorandum of law, page 14, the distances from the Wing residence to the various plots identified as 1B, 2B, and 3B, as well as to the structures identified as the Wing garage and the gazebo, are not particularly significant. Although these distances generally exceed the 50 yards separating the barn from the fence that surrounded the house in Dunn, this fact is not surprising given the rural setting and the large parcel of land that is the site of the Wing residence.

Of much greater significance are the steps taken by defendant Wing to protect the structures and garden plots from public view. The site itself was selected with

concerns for privacy. A substantial border of trees along the public road was preserved to assure privacy. The driveways were laid out with a concern for privacy. The fact that the enclosure surrounding the Wing property is a natural enclosure consisting of trees does not in any way lessen its significance. Defendant Wing preserved the trees for the same reasons that other individuals in more populous settings erect fences.

Having sited his home and developed his property with concerns for privacy, defendant Wing engaged in uses of the area surrounding his home which are associated with the "sanctity of a man's home and the privacies of life." Id. There were some objective indicia of these activities, such as the barbecue pit and the picnic tables. These objective indicia of use are

important to the extent that they tend to corroborate the defendant's account of the activities associated with the area in question and the subjective expectations of privacy related to those activities. However, the court must still make a determination whether the individual "reasonably may expect that the area in question should be treated as the home itself." Id.

This evaluation of reasonableness requires the court to make the familiar objective assessment of the subjective feelings of a witness. Obviously, the fact that the defendant picnicked with family members in the area in question or that the defendant and Patricia Magagnoli sunbathed nude in the area or engaged in intimate relations in that area does not decide the curtilage issue. That kind of intimate

activity could involve unreasonable expectations of privacy. However, in this case "those intimate activities associated with domestic life and the privacies of the home" took place in an area which the defendant had carefully screened from the passing public with a natural boundary of trees that also protects the privacy of the residence. In this rural setting, the gardens, garage and gazebo, all carefully maintained, were an extension of the home and used as such. These factors lead the court to conclude that "the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." Id.

3. To justify a warrantless invasion of the curtilage of defendant Wing's property, the State would have to establish

that they had probable cause to believe that a crime was being committed on the premises, and that exigent circumstances justified immediate action to preserve evidence. The State cannot establish either probable cause or exigent circumstances in this situation.

Although Deputy Ferland had prior experience with aerial surveillances, and although he thought he had detected vegetation that might be marijuana growing on the premises, he realized that he could not confirm that observation without closer scrutiny. His own conduct indicates that prior to the entry into the curtilage of the Wing property he did not possess sufficient information to permit a reasonable and prudent person to believe on the basis of the information at hand that a crime was being committed. The "tip" about

marijuana growing on the property of Blaine Richards was so stale that it could not enhance the probable cause determination. Again, the conduct of the deputies suggest that they also recognized that fact.

The argument that exigent circumstances required entry onto the premises to preserve evidence is also unpersuasive. That entire exigency rests upon nothing more than the proximity of a truck with its tailgate down to the area identified as 4B on State's Exhibit #1. No activity was observed on the ground. The argument that individuals might have been hiding in the woods to avoid detection was pure conjecture. In short, there was no "compelling necessity for immediate action as will not brook the delay of obtaining a warrant." United States v. Cresta, 592 F.Supp. 889 (D.Me. 1984).

4. Most of the information set forth in the affidavit submitted to obtain the search warrant for the Wing property was derived from the entry onto the Wing property. Since that entry involved an invasion of the curtilage of the Wing residence, and since that entry was without justification, no information derived from that illegal entry can be used to support the issuance of the warrant. The only information set forth in the affidavit that does not result from the entry onto the Wing premises--the aerial observation--is not sufficient to support the issuance of a warrant for a search of the Wing premises. All evidence obtained from the Wing property pursuant to that search must be

suppressed.[1] United States v. Nelson, 459 F.2d 884, 895 (6th Cir. 1972).

5. With respect to the property of Blaine Richards, the entry onto his property by police officials did not involve an invasion of the curtilage of his home. Again, the distances between the Richards residence and the gardens identified as 1A and 2A are not significant. Although the testimony of others at the hearing (defendant Richards did not testify) suggests that the Richards residence was also screened from the public

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[1]Patricia Magagnoli has been identified as a "companion" of Paul Wing. Testimony suggested that she was living at the Wing residence. She has adopted all the arguments of Paul Wing. The State has not challenged her standing to do so. The court's analysis of Paul Wing's motion to suppress also applies to the motion of Patricia Magagnoli.

road by woods, there was no testimony concerning any residential uses of the area surrounding the home. There was no evidence of any attempt to maintain the area around the home for residential uses, and there was no evidence of any steps taken by defendant Richards to protect his privacy from the scrutiny of others beyond the location of the residence itself in a wooded area. Under these circumstances, the court cannot conclude, as it did with respect to the Wing property, that "the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." United States v. Dunn, 107 S.Ct. 1134, 1139. Since the entry onto the Richards premises did not involve an invasion of the curtilage, and since the information set forth in the

affidavit relating to the Richards property was not based on an entry into the curtilage, there is no need to explore the issue of probable cause and exigent circumstances with respect to the Richards property.

6. If the court finds that allegations made in the affidavit used to obtain issuance of the search warrant for the Richards property were false, were made recklessly or intentionally, and were material to the affidavit, they must be excised from the affidavit. The court must then evaluate probable cause on the basis of the material that remains in the affidavit. Franks v. Delaware, 438 U.S. 154 (1978). Deputy Ferland's statements relating to exigent circumstances, to the extent that they were misstatements, were not material to the probable cause

determination of the complaint justice. The fact that Deputy Ferland heard a vehicle leaving the Richards residence, rather than seeing it, is not an intentional or reckless misstatement of a material fact. Other statements complained of involving the placement of the automobile of Patricia Magagnoli at the Richards residence, and the proximity of the Richards residence to marijuana plants harvested on the Wing property, are at most negligent misstatements of fact which do not meet the intentional or reckless standards set forth in Franks. Moreover, even if such statements were excised from the affidavit and disregarded, the remaining information relating to the close observation of marijuana cultivation in plots 1A and 2A amply supports a probable cause finding for the issuance of a search

warrant for the Richards property and residence.

7. The "generically described goods" in the warrant and affidavit are, as the State argues, contraband. Under these circumstances, the generic description is appropriate with respect to "controlled drugs and/or other contraband, including but not limited to marijuana..." See State v. Sweatt, 427 A.2d 940 (Me. 1981). Drug paraphernalia is also contraband under Maine law. The business records described are only those "pertaining to the acquisition, sale and distribution of the said drugs and/or other contraband." Similarly, the warrant identifies "firearms, in close proximity of illegal drugs and contraband." Under these circumstances, the generic descriptions found in the warrant are appropriate.

8. Although the motor vehicle of Karen Randall is not described specifically in the warrant, the probable cause established by the affidavit of Deputy Ferland with respect to the Richards property applies to all motor vehicles present at the Richards property. The probable cause to search the property of Blaine Richards for drugs and drug paraphernalia also applies to a search of vehicles on the premises which could also contain such drugs and drug paraphernalia. The vehicle of Karen Randall is not a vehicle that just happened to drive on to the premises while the search was being conducted. The car arrived on the premises while the search warrant was being obtained. That vehicle arrived at the scene driven by Blaine Richards with Karen Randall as a passenger. Under these circumstances, the

Randall vehicle was a vehicle located upon the property of Blaine Richards. Since the search of the Randall vehicle was legal, there is no basis for suppressing the statements of Karen Randall made while she was questioned, after Miranda warnings, about the cocaine found in her vehicle.

9. It has been stipulated in this case that the complaint justice was lawfully appointed. This stipulation means that the court must assume that the complaint justice was an attorney at law who held the powers of a notary public duly authorized to issue search warrants.

Wherefore, the Order and Entry shall be:

1. The motion to suppress filed by defendant Paul Wing is GRANTED (CR-87-427).

2. The motion to suppress filed by defendant Patricia Magagnoli is GRANTED (CR-87-429).

3. The motion to suppress filed by defendant Blaine Richards is DENIED (CR-87-428).

4. The motion to suppress filed by defendant Karen Randall is DENIED (CR-87-430).

DATED: May 18, 1988

s/Kermit V. Lipez
Kermit V. Lipez
Justice, Superior Court

No. 89-381

In The

Supreme Court of the United States

October Term, 1989

STATE OF MAINE,

Petitioner,

v.

PAUL WING, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of Maine

RESPONDENTS' BRIEF IN OPPOSITION

JOSEPH M. O'DONNELL
Goodspeed & O'Donnell
P.O. Box 785
Augusta, Maine 04332
(207) 622-6161
Counsel of Record for Respondents

JOHN D. PELLETIER
WALTER T. OLLEN

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF THE CASE

This case arises from the warrantless entry by officers of the Kennebec County Sheriff's Department onto property owned by Respondent Paul Wing and occupied by Mr. Wing and Respondent Patricia Magagnoli.

The Wing property consists of approximately 4.5 acres of primarily wooded land in Litchfield, Maine. The wooded areas surround a clearing that contains a house, a garage, and a landscaped lawn area, all of which cannot be seen from the public highway. Entry onto the property is gained by means of a single driveway, which Paul Wing constructed. Mr. Wing purposely placed a bend or curve in this driveway so as to obstruct the view of his property from the public road and assure his privacy. In addition, he selectively cleared trees from his property with these same purposes in mind. *Appendix to Petition for Writ of Certiorari* at 5, 22-23 (hereinafter referred to as App. at ___ .).

Approximately 100 feet onto the property, Mr. Wing's driveway divides into a fork. The left branch leads to Mr. Wing's house, the right branch to his garage and lawn area. The lawn area is landscaped and contains a gazebo and a barbecue pit, as well as picnic tables and lawn chairs. *App.* at 4-5. Mr. Wing and Ms. Magagnoli used this lawn area for social and recreational activities, including hosting picnics, sunbathing (occasionally in the nude), and engaging in sexual relations. *App.* at 23.

In its statement of the case, Petitioner asserts that "[i]n the course of driving to the end of the right branch" of Mr. Wing's driveway, the officers saw marijuana growing. *Petition for Writ of Certiorari* at 5. The suppression

Justice made no such finding. In his decision, he found: "The officers took the driveway to the right and parked the car on the grassy area . . . . The driveway ended at the grassy area. The officers saw before them what appeared to be marijuana plants . . . ." *App.* at 22.

SUMMARY OF ARGUMENT

Given the factual findings of the suppression Justice, Question 1, as set forth by Petitioner, is not raised by this case. Petitioner seeks review of the legality of observations made by police officers from the driveway of Paul Wing. The trial court, however, found that the officers did not see marijuana until they had travelled beyond the end of the driveway and parked upon a grassy area that the Court determined to be curtilage. Thus, this case presents no observation from a driveway for the Court to review.

Even if the trial court's findings could be construed to include observations from the driveway, the holding that such observations were made in violation of the curtilage does not conflict with decisions of other state and federal courts. The rationale for a diminished expectation of privacy in driveways rests on the utilization of driveways by members of the public approaching a home to do business with its occupants. Even accepting Petitioner's version of the facts, the observations in this case were made from the driveway leading to a garage, not the driveway leading to the home over which members of the public might be expected to travel to approach the residence for legitimate purposes.

The suppression Justice correctly applied the *Dunn* analysis to the instant case. Moreover, given the idiosyncratic nature of Mr. Wing's rural property, this case provides little opportunity for useful elaboration of the analytical framework set forth in *Dunn*.

REASONS FOR DENYING WRIT

I. THE ISSUE PRESENTED IN QUESTION 1, AS SET FORTH BY PETITIONER, IS NOT RAISED BY THIS CASE, AND EVEN IF RAISED, WAS NOT DECIDED BY THE STATE COURT IN A WAY THAT CONFLICTS WITH THE DECISIONS OF OTHER STATE AND FEDERAL COURTS.

A. The Officers Made No Observations from Mr. Wing's Driveway.

Question 1, as set forth by Petitioner, addresses the constitutionality of observations made by police officers from Mr. Wing's property. As a basis for raising this issue, Petitioner's *Statement of the Case* asserts that the officers observed marijuana "[i]n the course of driving to the end of the right branch" of Mr. Wing's driveway. The suppression Justice found, however: "The officers took the driveway to the right and parked the car on the grassy area . . . . The driveway ended at the grassy area. The officers saw before them what appeared to be marijuana plants. . . ." *See App.* at 22. Although not explicit, the sequence and structure of the Justice's findings imply that the officers did not see any marijuana until they had progressed beyond the driveway and onto the grassy

area. Accordingly, this case presents no issue regarding observations made from a driveway.

B. Even Assuming Petitioner's Interpretation of the Suppression Justice's Findings, the Decision of the State Court Does Not Conflict With Those of Other State and Federal Courts.

Petitioner contends that the decision of the Maine Supreme Judicial Court affirming the suppression of evidence in this case conflicts with the decisions of other state and federal courts regarding the legality of observations made from driveways. This assertion must be judged in light of two principles underlying the constitutional analysis of police observations made from driveways. First, driveways are semiprivate areas with respect to which the extent of fourth amendment protection will depend on the circumstances of each individual case. *United States v. Magana*, 512 F.2d 1169, 1171, (9th Cir.), *cert. denied*, 423 U.S. 826 (1975). Second, the diminished expectation of privacy in a driveway derives from the expectation that members of the public with legitimate business to conduct with a homeowner will use the driveway as a means of approach, whether they be salesmen, pollsters, or police. *United States v. Roberts*, 747 F.2d 537, 543 (9th Cir. 1984).

In the instant case, Petitioner admits that any observations made from the driveway (assuming the police made such observations) were made from the right branch of the driveway leading to the garage. Only the left branch of the driveway leads to Mr. Wing's home. Accordingly, even members of the public having business at the Wing residence would have no reason to proceed

up the right branch. The rationale for a diminished expectation of privacy in this portion of the driveway simply does not apply.

The state and federal court decisions cited by Petitioner as in conflict with the State Court decision in the instant case all deal with police observations made while on the normal and direct route of approach to the home. *See Petition for Writ of Certiorari* at 11-14 and cases cited therein. Given the factual distinction in the instant case, i.e. the portion of driveway in question was not the normal or direct route of access to the home, the finding of a greater expectation of privacy in the instant case in no way conflicts with the decisions cited by Petitioner.

II. THIS CASE REPRESENTS NEITHER A MISAPPLICATION OF *DUNN* NOR AN OPPORTUNITY TO REFINE THE ANALYSIS SET FORTH IN THAT CASE.

In *United States v. Dunn*, ___ U.S. ___ , 107 S. Ct. 1134, 1139 n.4 (1987), the Supreme Court rejected an invitation to lay down a bright-line test for identifying the curtilage. Rather, the Court set forth a four-factor analysis to be applied to the circumstances of each case. Nothing can be said here to improve upon the suppression Justice's reasoned and faithful application, set forth at pages 39-44 of the *Appendix to Petition for Writ of Certiorari*, of the *Dunn* test to the facts of this case. It will suffice to address two points raised by Petitioner with respect to the trial court's analysis.

First, Petitioner notes that a person located in the wooded area of the Wing property, arguably an area akin

to open fields, could see into the area identified as curtilage. The suppression Justice, however, emphasized Mr. Wing's use of woods, through the design of his driveway and the selective cutting of trees, as a natural enclosure ensuring privacy. While it is possible that one located in the woods could see into the clearing, the Court's findings reflect the reasonableness of Mr. Wing's belief that such an enclosure, in a rural Maine setting, would in fact provide privacy. Moreover, an area does not lose its status as curtilage simply because one situated outside the curtilage may see into it. For example, in airplane overflight cases, Courts have not held that the area viewed is not curtilage; rather they held simply that the viewer did not intrude upon the curtilage in gaining his vantage point. *See, e.g., California v. Ciralo*, 476 U.S. 207 (1986); *United States v. Bassford*, 812 F.2d 16 (lst Cir. 1987). In this case, the officers physically intruded upon the curtilage.

Second, Petitioner points to the distance between Mr. Wing's house and lawn and to the location of trees and a rockwall between the two. Of course, this factor does not favor the finding of curtilage. Nevertheless, the Supreme Court has refused to lay down any bright-line test because numerous factors figure into the curtilage analysis. Accordingly, and contrary to Petitioner's assertion, no single factor controls.

Finally, this case presents the type of unique situation that calls for reasoned application of the analytical framework set forth in *Dunn*. Because of its uniqueness, the case presents little opportunity to provide additional guidance to courts analyzing the curtilage question. On the other hand, the obvious relevance and helpfulness of the *Dunn* factors to the curtilage analysis of this very

unique situation demonstrate that the *Dunn* framework remains useful and adequate. Nothing could be gained from further discussion of the issue in the context of this case.

CONCLUSION

For the reasons set forth above, Respondents Paul Wing and Patricia Magagnoli respectfully pray that the Petition for a Writ of Certiorari to the Maine Supreme Judicial Court be denied.

Respectfully submitted,

JOSEPH M. O'DONNELL
GOODSPEED & O'DONNELL
P.O. Box 785
Augusta, Maine 04332
(207)-622-6161
Counsel of Record for
Respondents

JOHN D. PELLETIER
WALTER T. OLLEN

Attorney for Respondents

No. 89-381

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

STATE OF MAINE,
Petitioner

V.

PAUL WING, et al.,
Respondents

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

JAMES E. TIERNEY
Attorney General

JAMES T. KILBRETH
Chief Deputy Attorney General
State House Station 6
Augusta, Maine 04333
(207) 289-3661
Counsel of Record for Petitioner

DAVID W. CROOK
District Attorney

WAYNE S. MOSS
Assistant ATtorney General

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CONSTITUTIONAL PROVISIONS

ARGUMENT

I. PETITIONER'S QUESTION 1, WHETHER DRIVEWAYS ARE OUTSIDE THE CURTILAGE, IS RAISED BY THE FACTS IN THIS CASE AND NEEDS TO BE ANSWERED TO RESOLVE A CONFLICT BETWEEN THE MAINE COURT'S DECISION ON THE ONE HAND AND THE DECISIONS OF OTHER COURTS AND THIS COURT IN UNITED STATES V. DUNN ON THE OTHER.

Respondents selectively edit the Suppression Justice's findings of fact to say: "The officers took the driveway to the right and parked the car on the grassy area.... The driveway ended at the grassy area. The officers saw before them what appeared to be marijuana plants...." (Respondents' Brief in Opposition at 2-3). Respondents interpret these edited findings to mean that the police did not see

marijuana from Wing's driveway and thus the issue presented in Petitioner's Question 1, whether driveways are outside the curtilage, is not raised by this case.

The Suppression Justice in fact found, however, that the police could see from the right branch of Wing's driveway into the lawn area containing marijuana plot 3B:

> 9. The driveway into the Wing property divides into a Y at a point about 100 feet from the road. The driveway to the left leads to the Wing residence. The driveway to the right leads to a lawn area. The officers could not see into that lawn area because of a rise in the driveway until they got beyond the Y intersection.
>
> 10. The officers took the driveway to the right and parked the car on the grassy area between 4B and the screen house or gazebo (See State's Exhibit #1 attached hereto as an appendix). The driveway ended at the grassy area.

> The officers saw before them what appeared to be marijuana plants growing in a plot identified as 3B on State's Exhibit #1 [App. 56].

(App. 21-22 (emphasis added)). These findings are based on the undisputed testimony at the suppression hearing that the police saw marijuana from Wing's driveway. (Transcript of Suppression Hearing 28-29 (marijuana plot 3B seen just before Wing driveway splits into Y), 57-58 (3B visible as driving up the right branch of Wing driveway), 129 (3B seen when one-half to three-quarters up Wing driveway), 232 (3B seen from Wing driveway "[r]ight around the area of the fork"), 259 (3B seen from right branch of Wing driveway)). Because the police did see marijuana from Wing's driveway, Question 1 is raised by the facts in this case.

Respondents also claim that there is no conflict to be resolved by this Court, arguing that this case is factually distinguishable from the cases cited in the petition where the police observations were "made while on the normal and direct route of approach to the home." (Respondents' Brief in Opposition at 5). This argument ignores the fact, however, that in several of these cases the police deviated from the normal and direct route of access to the home and yet no fourth amendment violation was found. See, e.g., State v. Wilbourn, 364 So.2d 995 (La. 1978), cert. denied, 444 U.S. 825 (1979) (curtilage not violated where police entered unenclosed carport to look at front of vehicle that was visible from but not on direct route to side-door of house); State v. Pike, 143 Vt. 283, 465

A.2d 1348, 1350 (1983) (curtilage not violated where wardens, after driving up driveway, examined a vehicle and then "followed a distinct trail of blood" to another vehicle without approaching door to mobile home); State v. Brighter, 60 Hawaii 318, 589 P.2d 527 (1979) (fourth amendment not violated where officer walked to tree about 30 feet from driveway and from there saw marijuana plants that would have been visible from driveway if laundry had not obstructed view); see also State v. Corbett, 516 P.2d 487 (Or. App. 1973) (fourth amendment not violated where police do not intend to go, and in fact do not go, to front door but instead walk part way up driveway to investigate criminal activity).

Moreover, as the cited cases recognize, it makes no difference for fourth amendment

purposes that the police here took the right branch of Wing's driveway leading to the garage rather than the left branch leading to his house. In terms of "the nature of the uses to which the area is put" (United States v. Dunn, 480 U.S. 294, 301, 302-03 (1987)) and associated privacy expectations, a driveway is a driveway (cf. Arizona v. Hicks, 480 U.S. 321, 325 (1987) (Scalia, J.) ("[a] search is a search"); Dunn, 480 U.S. at 305 (Scalia, J., concurring) ("the house was a house")) regardless of whether it leads directly to the front door or leads to a garage area, as here, where people can park their automobiles and then walk to the front door or to other areas. Furthermore, when driving through woods on some rural driveways, it is not always possible to

determine which branch of a fork leads to the house, which branch to the garage, and which to outlying fields or other areas. The constitutionality of police observations should not depend on whether an officer correctly guesses the branch that leads to the front door.

Although Dunn rejected "the Government's invitation to adopt a 'bright-line rule' that 'the curtilage should extend no farther than the nearest fence surrounding a fenced house'" (Dunn, 480 U.S. at 301), there is nothing in Dunn that precludes - indeed, Dunn's four-factor analysis supports - a bright-line rule that driveways are not protected by the fourth amendment.

II. QUESTION 2, WHETHER THE LAWN AREA IS OUTSIDE THE CURTILAGE, PRESENTS AN OPPORTUNITY FOR FURTHER CLARIFICATION OF WHAT CONSTITUTES CURTILAGE.

Respondents further claim that this "case presents little opportunity to provide additional guidance to courts analyzing the curtilage question" under Dunn. (Respondents' Brief in Opposition at 6). On the contrary, this case presents a shade of gray lacking in Dunn.

In Dunn, the ranch area around the barn was like open fields (Dunn, 480 U.S. at 303-05) in that it was not the location of any activities involving an expectation of privacy. See Oliver v. United States, 466 U.S. 170, 179 (1984). This factor helped to make Dunn a relatively easy case in determining that the barn neither was part of the home's curtilage nor had its own

curtilage and that there was no reasonable expectation of privacy in the ranch area around the barn. Dunn, 480 U.S. at 302-04. In contrast, there was evidence in the instant case that Wing's outlying lawn area was used for social and sexual activities and was protected from view from a public road. Because Wing claims to have expected privacy in his activities, these facts present a closer case under the Dunn test for determining what constitutes curtilage. This case thus provides an opportunity for this Court to address a common issue not answered by Dunn - i.e., whether those sections of a large lawn area that are at a distance and separated from a house but are mowed, cultivated, or used occasionally for social, recreational, or other subjectively private activities fall within the curtilage.

CONCLUSION

For these reasons and the reasons in the petition, a writ of certiorari should issue to review the judgment and opinion of the Maine Supreme Judicial Court in State of Maine v. Paul Wing, 559 A.2d 783 (Me. 1989).

Respectfully submitted,

JAMES E. TIERNEY
Attorney General
State of Maine

JAMES T. KILBRETH
Chief Deputy Attorney General
State House Station 6
Augusta, Maine 04333
(207) 289-3661
Counsel of Record for
Petitioner

DAVID W. CROOK
District Attorney

WAYNE S. MOSS
Assistant Attorney General

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